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CPLR 302(a)(2): Expansion of Tortious Act Jurisdiction

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section, CPLR 302(a)(1), was being applied. The court also held that jurisdiction was obtainable under CPLR 301, which incorporated existing bases of jurisdiction, since it was settled that the courts of this state may act as *parens patriae* to determine the custody of children within its borders regardless of the domicile of the parents.²⁷

The "transacting business" provision of 302(a)(1) has generally been utilized in the area of commercial activity, but some decisions involving separation agreements have indicated that there is no such limitation,²⁸ and another recent family court opinion has flatly stated that the long-arm statute is available to litigants in that tribunal.²⁹

The *Ellick* opinion did not explicitly state that the long-arm provision applies to non-commercial transactions. Indeed, some of its language indicates that the respondent's conduct was considered to have had commercial ramifications: "[H]er children have continuously received support and care in New York, and she has been relieved of the obligation of their support."³⁰ The court was satisfied to state that the "minimum contacts" test³¹ established by the United States Supreme Court for exercising personal jurisdiction had been satisfied.

This decision is a laudable exercise of long-arm jurisdiction.

CPLR 302(a)(2): Expansion of tortious act jurisdiction.

In *Francis I. duPont & Co. v. Chelednik*,³² the Appellate Term, First Department, exercised jurisdiction over a New Jersey resident who traded on the New York Stock Exchange through the New York plaintiff-stock brokerage firm. The plaintiff alleged that although the defendant knew that certain securities were erroneously placed in his account, he instructed it to sell these securities and remit the proceeds to him. After the mistake was discovered and the defendant refused to

²⁷ See *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925). The other cases cited by the court to buttress its argument involved custody jurisdiction incidental to marital actions. Evidently, the adoption proceeding was deemed a kind of custody proceeding, thus making the traditional *parens patriae* view applicable.

²⁸ See *Kochenthal v. Kochenthal*, 28 App. Div. 2d 117, 282 N.Y.S.2d 36 (2d Dep't 1967), discussed in *The Quarterly Survey*, 42 ST. JOHN'S L. REV. 128, 132 (1967); *Raschitore v. Fountain*, 52 Misc. 2d 402, 275 N.Y.S.2d 709 (Sup. Ct. Monroe County 1966) (dictum). *Contra*, *Whitaker v. Whitaker*, 56 Misc. 2d 265, 289 N.Y.S.2d 465 (Sup. Ct. Ulster County 1968), *aff'd mem.*, 32 App. Div. 2d 595, 299 N.Y.S.2d 482 (3rd Dep't 1969); *Willis v. Willis*, 42 Misc. 2d 473, 248 N.Y.S.2d 260 (Sup. Ct. N.Y. County 1964).

Dean McLaughlin states that separation agreements have been accepted as transactions of business because of the "commercial earmarks" generally incorporated into them. 7B MCKINNEY'S CPLR 302, commentary at 83 (1972).

²⁹ See *Lawrenz v. Lawrenz*, 65 Misc. 2d 627, 318 N.Y.S.2d 610 (Fam. Ct. Westchester County 1971).

³⁰ 69 Misc. 2d at 177, 328 N.Y.S.2d at 589.

³¹ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

³² 69 Misc. 2d 362, 330 N.Y.S.2d 149 (App. T. 1st Dep't 1971) (per curiam).

return the money, an action was commenced. The court found that the complaint sounded in both tort and contract and decided that the operation of a New York stock account constituted the transaction of business in the state. Additionally, under 302(a)(2), the court found that the defendant's intention to defraud the plaintiff by receiving the proceeds from securities which he allegedly knew were wrongfully in his account, subjected him to jurisdiction for commission of a tortious act within the state.³³

This case further broadens the scope of CPLR 302(a)(2). On its facts, it is clearly correct. Nevertheless the bench and bar alike must remain vigilant to the danger of allowing "a plaintiff . . . , merely by alleging that a contracting party never intended to fulfill his promise, [to] create a tortious action in fraud. . . ." ³⁴ Such simple conversion of contract actions into tort actions must not be allowed.

CPLR 303: Service of summons upon attorney.

CPLR 303 provides that commencement of an action in New York by one not subject to personal jurisdiction in the state is an automatic designation of his attorney as his agent for the service of process during the pendency of the action. It applies if the second action could have been asserted as a counterclaim in the first action, had the latter been brought in the supreme court. This section has now been amended³⁵ to incorporate by reference CPLR 308, thereby making the five methods of service provided in CPLR 308 available when service is to be made upon the attorney. Case law had previously held that only personal delivery to the attorney was sufficient.³⁶

CPLR 308(5): Substituted service permitted in divorce action.

CPLR 308(5) invests the judiciary with discretionary power to devise modes of serving a natural person when all other statutorily pre-

³³ *Id.* at 363, 330 N.Y.S.2d at 150. In *Hertz, Newmark, & Warner v. Fischman*, 53 Misc. 2d 418, 279 N.Y.S.2d 97 (N.Y.C. Civ. Ct. N.Y. County 1967), discussed in *The Quarterly Survey*, 42 ST. JOHN'S L. REV. 436, 446 (1968), the court held that it did not have jurisdiction over a New Jersey resident who traded on the New York Stock Exchange through a New Jersey branch of a New York brokerage firm. The defendant telephoned his orders to the plaintiff's New Jersey representative who contacted the plaintiff's main office in New York. The court stated that "where the agent and not a third party sues the principal, the agent's act will confer jurisdiction over the principal only if the agency was an exclusive one." *Id.* at 421, 279 N.Y.S.2d at 100, citing *A. Millner Co. v. Noudar, Ltd.*, 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966), discussed in *The Quarterly Survey*, 41 ST. JOHN'S L. REV. 279, 293 (1966).

³⁴ *Stanat Mfg. Co. v. Imperial Metal Finishing Co.*, 325 F. Supp. 794, 796 (E.D.N.Y. 1971), discussed in *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 362 (1971).

³⁵ L. 1972, ch. 487, at 1000-01, eff. Sept. 1, 1972.

³⁶ *Twentieth Century-Fox Film Corp. v. Dupper*, 33 App. Div. 2d 682, 305 N.Y.S.2d 918 (1st Dep't 1969), discussed in *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 758, 773 (1970).